1941

Combined Metals Reduction Company and Bud T. Stevenson and John R. Alverson, co-partners doing business under the firm name and style of Stevenson & Alverson v. The Industrial Commission of Utah : Brief of Defendant

Utah Supreme Court

Respectfully submitted, H. Van Dam, Jr.; Attorney for plaintiffs;

6315

CASE NO. 6315

In the Supreme Court of the State of Utah

COMBINED METALS REDUCTION COMPANY, a corporation, and BUD T. STEVENSON AND JOHN E. ALVERSON, co-partners doing business under the firm name and style of Stevenson & Alverson,

Plaintiffs,

vs.

THE INDUSTRIAL COMMISSION OF UTAH,

Defendant.

BRIEF OF DEFENDANT

GROVER A. GILES,
Attorney General

S. D. HUFFAKER,
Deputy Attorney General

A. M. FERRO,
Special Assistant Attorney General

F. F. DREMANN,
Special Counsel

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CASES CITED

OTHER CITATIONS

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STATEMENT OF THE CASE

This is an action brought by the Combined Metals Reduction Company, a corporation, and Bud T. Stevenson and John E. Alverson, co-partners doing business under the firm name and style of Stevenson & Alverson, to review a decision of the Industrial Commission hold-

ing services performed by Stevenson and Alverson, lessee miners of the company, to be services performed "in employment" with the meaning of Section 19(j), Chapter 43, Laws of Utah, 1937, and Chapter 52, Laws of Utah, 1939. The Combined Metals Reduction Company, is a corporation, (an "employer" under the Utah Unemployment Compensation Law (Tr. 3)), engaged in mining operations in certain mining properties, including those known as the Queen Tunnel and the Butterfield Tunnel.

On June 9, 1938, Bud T. Stevenson and John E. Alverson, hereinafter designated as "lessees" entered into a lease agreement with the Combined Metals Reduction Company, a Utah corporation. (Company's Exhibit 1.)

The Combined Metals Reduction Company will hereinafter be designated as the "Company."

The Industrial Commission of Utah will hereinafter be designated as the "Commission."

The transcript of the hearing in this case will hereinafter be designated as "Tr."

On the second day of October, 1940, a decision was rendered by a representative of the Department of Placement and Unemployment Insurance holding that the services performed by the "lessees" constituted services performed "in employment" within the provision of the Utah Unemployment Compensation Law and that they, Steven-

son and Alverson, were not "employers" subject to contribution liability within the provision of that Law.

On the third day of October, 1940, a representative of the Department of Placement and Unemployment Insurance rendered a decision of similiar effect finding that the Combined Metals Reduction Company was the "employer" and the "lessees" and, any individuals hired by them, were "in employment" while performing services in accordance with the lease agreement herein referred to. The Company was required to file necessary reports on this employment with the Commission. The Company and the "lessees," by their attorney, disagreed with these decisions, and on the eighth day of October, 1940, filed appeals. The causes were joined by stipulation.

On the tenth day of October, 1940, a hearing was held before the Appeal Tribunal, and on the fifteenth day of October, 1940, the Appeal Tribunal rendered a decision finding that:

> "1. Under the facts presented in this case Stevenson and Alverson were 'in employment' with the Combined Metals Reduction Company during the period of time in question within the meaning of Section 19(j)(l) of the Utah Unemployment Compensation Law.
>
> "2. Stevenson and Alverson performed a personal service for the Combined Metals Reduction Company for wages within the meaning of Section

19(j) (5) of the Utah Unemployment Compensation Law.

"3. Such services performed by Stevenson and Alverson for the Combined Metals Reduction Company were not free from control or direction by the Company under the contract of service within the meaning of Section 19(j) (5) (a) of the Utah Unemployment Compensation Law.

"4. The services performed by Stevenson and Alverson were performed within the usual course of the Company's business and were performed within the place of business of the Combined Metals Reduction Company within the meaning of Section 19(j) (5) (b) of the Utah Unemployment Compensation Law.

"5. Stevenson and Alverson were not customarily engaged in an independently established trade, occupation, profession, or business, within the meaning of Section 19(j) (5) (c) of the Utah Unemployment Compensation Law."

On the eighteenth day of October, 1940, the Combined Metals Reduction Company and Bud T. Stevenson and John E. Alverson appealed from this decision to the Industrial Commission of Utah.

On the twenty-eighth day of October, 1940, the Industrial Commission of Utah denied the appeal and affirmed the decision of the Appeal Tribunal.

The matter now comes before this Court on a Petition for Writ of Review.

In their brief (pp. 4-5), the petitioners outline several propositions:

> "(a) That the conclusion reached that Stevenson and Alverson are not employers but are performing services in employment for Combined Metals Reduction Company is not supported by the facts and is contrary to law.
>
> "(b) A judicial question is involved, the determination of which is outside and beyond the jurisdiction of the Industrial Commission of Utah.
>
> "(c) That Sec. 19(j) Utah Unemployment Compensation Law (Ch 1 Special Session 1936, Amd Ch 43, 1937 and Ch 52, 1939) is invalid under Sec. 23, Art. VI, Constitution of Utah, as to title of amendatory acts.
>
> "(d) Also that said Utah Unemployment Compensation Law is violative of Federal and State Constitutions, as unreasonably depriving parties of the right to contract."

They state that all of these propositions will be relied upon by the lessor and only (a) and (d) by the "lessees."

The Commission takes the position, however, that its decision is correct and contends:

1. That the "lessees" were "in employment" within the meaning of Section 19(j) of the Utah Unemployment Compensation Law.

2. The Commission properly exercised jurisdiction over the matters invloved.

3. That Section 19(j) of the Utah Unemployment Compensation Law (Chapter 1, Special Session, 1936, amended by Chapter 43, Laws of Utah, 1937, and Chapter 52, Laws of Utah, 1939) is valid under Sec. 23, Art. VI, Constitution of Utah, as to title of amendatory acts.

4. That the Utah Unemployment Compensation Law does not violate the State and Federal Constitutions by depriving the parties of their right to contract.

ARGUMENT

I.

THE "LESSEES" WERE "IN EMPLOYMENT" WITHIN THE MEANING OF THE UTAH UNEMPLOYMENT COMPENSATION LAW.

A. The legislative history, language, and plan of of the statute clearly contemplate coverage under the Law broader in scope than the traditional common law relationship of master and servant.

The Unemployment Compensation Law as originally enacted by the legislature in 1936 (Laws of Utah, Special Session, 1936, Chapter 1) defined "employment" in Section 19(g) thereof in the following terms:

"Employment means service, including service in

> interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied, which service (1) is performed in this state by an individual, exclusive, however, of any service within this state which is incidental to the individual's service performed elsewhere; or (2) is performed elsewhere but is incidental to an individual's service in this state; . . ."

Under this definition it might have been argued that coverage under the Law was not defined in precise terms, and it might have been urged that it alluded to the traditional common law master and servant relationship. See *Texas Company* v. *Wheeless,* (Miss. 1939), 187 So. 880.

In 1937, the Legislature of this State felt impelled to change this definition and to ascribe to the term "employment" a more precise meaning and to give to it a scope wide enough to cover thereunder persons other than those who are servants under common law concepts.

In Section 19(j) (1), Chapter 43, Laws of Utah, 1937, "employment" is redefined as follows:

> " . . . service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

It added the provision that, regardless of whether the relationship between an individual and the unit for which services were performed was that of master and servant

or principal and independent contractor, all services performed for wages shall constitute "employment" unless the circumstances under which the services were performed met three named conditions for exclusion. The provision thus added reads (Section 19(j) (5)):

> "Services performed by an individual for wages shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commission that—
>
> "(a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and
>
> "(b) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> "(c) such individual is customarily engaged in an independently established trade, occupation, profession or business."

This change in the definition of "employment" obviously flowed from a change in intent. A comparison of the definition as written by the Legislature shows that it adopted standards which were wholly unlike those used to determine employment under traditional common law and master and servant concepts for the purpose of determining coverage under the Utah Unemployment Compensation Law; in other words, the statute

specifies only three criteria to be considered, and a determination that a relationship does not conform to any single one of these is sufficient to create statutory "employment."

The courts have so generally recognized that the statutory criteria in the various unemployment compensation laws should be followed without reference to any previous common law concepts that the rule has now become definitely established. See *Globe Grain & Milling Company* v. *The Industrial Commission of Utah,* 98 Utah 36, 91 P. (2d) 512; *Creameries of America, Inc.* v. *The Industrial Commission of Utah,* 98 Utah 571, 102 P. (2d) 300: *Salt Lake Tribune Publishing Company* v. *The Industrail Commission of Utah,* (.....Utah.....), 102 P. (2d) 307; *National Tunnel and Mines Company* v. *The Industrial Commission of Utah,* (.....Utah.....), 102 P. (2d) 508; *Unemployment Compensation Commission of North Carolina* v. *Jefferson Standard Life Insurance Co.,* 215 N. C. 479, 2 S. E. (2d) 584; *Industrial Commission of Colorado* v. *Northwestern Mutual Life Insurance Co.,* 103 Colo. 550, 88 P (2d) 560; *Equitable Life Ins. Co. of Iowa* v. *Industrial Commission of the State of Colorado,* (Colo. October 16, 1939), 95 P. (2d) 4; *McDermott* v. *State of Washington,* 196 Wash. 261, 82 P. (2d) 568; *Georgia Bureau of Unemployment Compensation* v. *Young,* 10 S. E. (2d) 412.

B. The relationship between the "lessees" and the Company constituted "emplyoment" as defined

in Section 19(j) (5) of the Law.

The three statutory criteria in Section 19 (j) (5) are in the conjunctive. A showing of conformity with all three is a prerequisite to an exemption of coverage under the Law.

1. The Industrial Commission reasonably held that the Combined Metals Reduction Company failed to satisfy the tests for exclusion as set out in Subsection (a) of that Section which required a showing that:

> "Such individual has been and will continue to be free from control or direction over the performance of such services, *both under his contract of service and in fact* . . . " (Italics ours.)

To conform with this condition, the party claiming exemption from the Law must show not only that under the contract of employment the principal has not exercised and does not have the right to exercise control over the performance of service, but that the person performing the service is free from control or the possibility of control in the future both under the contract and in fact.

The statutory test above cited is considerably different from the test employed at common law to determine the existence of the master and servant relationship in that there is absent therefrom the factor of control over the *details* of the services performed which is commonly referred to in the Restatement of the Law of Agency.

Subsection (a) of the statutory test contains a positive requirement that the *individual* performing services be free from control over his performance if exemption is to be granted. Under the statute, it is unnecessary to determine what is a detail and what is "satisfaction with a result." The statutory relationship exists if the employer has a general control over the service performed. *Such general control for the purposes of the statutory standard is present* when the manner and means of performance are either predetermined by contract, necessarily resulting from the circumstances under which the serivces are performed, or flow from the economic relationship which the persons performing the services bear to the enterprise for which they are performed.

In recognition of this difference between the statutory test provided in Section 19(j) (5) (a) and the common law test relating to control, the Supreme Court of Colorado in *Industrial Commission of the State of Colorado* v. *Northwestern Mutual Life Insurance Co.*, 103 Colo. 550, 88 P. (2d) 560, with respect to a statutory definition of employment identical with that contained in the Utah statute stated:

> "The first condition in the statutory test relates to freedom of control and direction over the performance of services, both under contract and in fact. The test of freedom is either under contract or fact. Does the company control and direct the performance of services, or will it have the right to do so under the contract, if it desires to do so?

We are not here concerned with details but with general control. The possibility of control in the future is as important as an actual control at the present.

"In discussing the evidence we shall be controlled primarily by the undisputed facts, such as the contracts and the 'Rules and Instructions' governing the persons involved herein in their relations with the company. The question of control and direction, as set forth in section 19 (g) (5), is not a matter of degree. Undoubtedly, it relates to general control. It is not satisfied by some 'detail' in which the individual may be free to exercise his own judgment. The power to terminate a contract for personal service at any time without liability is an important factor in arriving at a conclusion as to whether the individual is free of control and direction, 'because the right immediately to discharge involves the right of control.' Industrial Com. v. Bonfils, 78 Colo. 306, 308, 241 Pac. 735." (Italics supplied.)

The view expressed by the Colorado court with respect to the significant differences between the common law test of control and the statutory test was adpoted by a Wisconsin court. See *Wisconsin Bridge & Iron Co.* v. *Industrial Commission of Wisconsin, et al.,* 290 N. W. 199, 233 Wis. 467. In the course of interpreting statutory language identical with Section 19(j) (5) (a) the Wisconsin court said:

"For purposes of the present decision, we need not go into all the points wherein the present legislative definition of employment departs from

> prior accepted standards. For instance, it has been regarded—and must still be so viewed under the workmen's compensation law—that lack of right to control is what precludes, in essence, the employment status. But by the first test of exclusion prescribed in 108.02(5) (a), it must be established that there is freedom from control not only (1) under the contract but also (2) in fact. Furthermore there must be established not only freedom from control in the past but that the individual 'will continue to be free from the employer's control or direction . . .'" (Italics supplied.)

If, therefore, the power of control exists under the contract or in fact, proof of the extent of its actual exercise or even proof of its non-exercise is wholly immaterial. The statute looks to control which may be exercised in the future and it is sufficient under the statute to constitute employment if the employer has the power, if he chooses to exercise it, over the performance of service at any time during the continuance of the relationship. See also *Creameries of America, Inc.* v. *The Industrial Commission of Utah, supra; Salt Lake Tribune Publishing Company* v. *The Industrial Commission of Utah, supra; Equitable Life Insurance Co. of Iowa* v. *Industrial Commission of the State of Colo., supra.*

In the case of the *National Tunnel and Mines Company, supra,* Chief Justice Moffat said and we quote:

> "Under the aforesetforth provisions of the leases, there are definite provisions made for the control and direction over the performance of the service

> both under the contract of hire and in fact. The only evidence that there is such a contractual relationship as a leasor-lessee relationship is found in the introductory provisions wherein it is stated the plaintiff does 'hereby grant, demise and let unto said Lessee that portion of the company's mining property situated . . .' It is specifically provided that the leasor reserves the property and the right of property in and to all ores extracted from said 'demised' premises. There is provided in the lease a general right of control and direction over the relationship created under the contract. The claimant meets the requirements for one eligible for benefits. See Pottordorff v. Fidelity Coal Mining Co., 86 Kans. 774, 122 P. 120; Industrial Commission v. Bonfils, 78 Col. 306, 241 P. 735; McDermott v. State et al., 196 Wash. 261, 82 P. (2d) 568. A contrary result was reached, though the same principles of law were applied, because the element of control was lacking in the case of Texas Co. v. Wheeless, ...Miss....., 187 So. 880."

As in the record of the *National Tunnel and Mines Company* case, the record in the instant case was that the "lessees" were not either under their contract with the company or, in fact, free from control of the possibility of such control in the future.

The Industrial Commission was not unreasonable in holding that the Company had failed to meet the test as provided by Section 19(j) (5) (a).

Under the terms of the so-called lease agreement (Company's Exhibit 1), the Company secured the per-

formance of well defined services by the claimant and did not, in a strict sense of the word, create a right or interest in the property to which the claimant was given a so-called property right.A review of both the contract and the transcript indicates that the most that can be said of the lease in the sense of creating a right or interest in the property is that it assigns the miners to work in a particular portion of the mine, and that it specifies what otherwise would be implied that, namely, while performing services at the assigned place, at times and in the manner determined by the Company, the miner is not to be considered as a trespasser. Such is the net effect of the use of the real property terminology in the contract. Moreover, this terminology amounts to no more than a specification of an incident of every employment contract; each such contract impliedly permits the individual performing services to come and remain on the employer's premises in the course of performing services. Section 304 of Tiffany, *Real Property,* states this self-evident principle:

> "A contract of lodging also giving not an exclusive right to a part of the premises, but merely a right to enter thereon and use them for certain purposes is in the nature of a license, and not a lease. Likewise, the permission generally tacit, given to an employee or other person having business with the owner of the land to enter on the land for the purpose of transacting such business creates the relationship of licensor and licensee."

The specification in the employment contract of

this tacit immunity of the employee with respect to his employer's property does not change the relationship nor affect the application of the statutory definition of employment. Of course, it is not contended that all bona fide leases of mining property create the statutory employment relationship; nevertheless, it should be apparent that the mere use of leasehold terminology should not be permitted to obscure the employment relationship. See *National Tunnel and Mines Company* v. *The Industrial Commission of Utah, supra; Creameries of America, Inc.* v. *The Industrial Commission of Utah, supra; Salt Lake Tribune Publishing Company* v. *The Industrial Commission of Utah, supra; McDermott* v. *Washington, supra; Industrial Commission of the State of Colorado* v. *Northwestern Mutual Life Insurance Company, supra.*

In an enterprise of any size the factory worker is assigned to a particular department or machine, a waiter to particular tables, and a retail clerk to particular counters. The perference of the employee may be given considerable weight by the employer in making the assignment, but in those cases and in the present case (Company's Exhibit 1), the employees cannot, without permission, leave their assigned post nor enter the premises except during the hours of business and in accordance with the practices established by the employer. Under the lease, the "lessees" were in the same situation as employees generally. They acquired no exclusive right to possession of any part of the mine. Anyone else whom the

employer permitted could enter on and use the premises and the lessees, like any employees, were required to adjust their activities to such use by others. See Company's Exhibit 1 (para. 6):

> "RIGHT-OF-WAY. 6. Lessee shall allow the Company or agents of said Company to have at all times access to all parts of said premises for the purpose of inspecting, surveying, or sampling the same. Said lease is to be subject to a right-of-way for the Company or its employees or its other leessees or their employees through all workings existing or that may be made within said premises."

The "lessees" not only acquired no title to the real estate but acquired no title to the minerals after they were extracted (Tr. 30-31), (Company's Exhibit 1, p. 8), and their presence in the mine was merely an incident to the general plan for operating the employer's enterprise. (Tr. 24). The terms of the lease sustain this conclusion. Under the lease the "lessees" were merely given the use of the premises in order that they might carry on the business of the Company. Indeed, the occupancy alone was of no value to the Company apart from the conduct of its business at the premises. The "lessees" were entitled to the "use" of the permises only for such purpose, and while there they were required to carry on activities in conformance with the Company's general operations. (Tr. 27, 28)

"Q. You mentioned that there were ten or twelve

sets of lessees in the Queen Tunnel?

"A. I believe I said eight or ten.

"Q. What provision is made for coordinating the activities of those men so they won't interfere with each other on transporting material into the mine or out of the mine?

"A. Well, that is more or less an arrangement between the individual lessees themselves to coordinate their operations and jointly with the Company. In other words, if several lessees happen to have a shipment ready all at the same time, they would have to arrange among themselves who would be shipped first or make some arrangement for their turn. There is no supervision by the Company of the lessees' activities. They handle their own affairs and have to make their own arrangements as to their transporation and as to their turn to get transportation when they have shipments available.

"Q. In the event lessees cannot agree, what occurs?

"A. Well, in that case I guess there would be an argument and it would depend on the system how it would turn out."

* * * * *

"Q. Does the Company maintain a superintendent or mining boss who, I was going to say, well, use the work 'supervise' operations in the Queen Tunnel?

> "A. Let me answer that in a little different way. The Company has a full mining organization at the property. This organization, provided by the Company to handle the entire property, consists of superintendent, chief bosses, mine clerks, and the customary organization that is set up to handle mining property. But as far as lessees on Queen Tunnel are concerned, the Company does not attempt to supervise their work."

The collection of "rental" would have been impossible except with reference to the services performed by the "lessees." The Company was mainly interested, since its income was derived from the profits on ore shipments, in producing as much ore as possible. (Tr. 24)

Under the authorities, it has been generally held that where the use of the premises is connected with, and incidental to the operations of the business of the lessor and is calculated to enable a more convenient performance of that business, the relationship of employer and employee exists even under the common law test of the existence of that relationship. See *McQuade* v. *Emmons,* 38 N. J. Law 397; *Waller* v. *Morgan,* 57 Ky. 136; *State v. Curtis,* 20 N. C. 363; *Neal* v. *Bellamy,* 73 N. C. 384; *Hayward* v. *Rogers,* 73 N. C. 320; *Tucker* v. *Park Yarn Mill Co.,* 140 S. E. 744. See also, *Bowman* v. *Bradley,* 151 Pa. 352, 24 A. 1062; *Davis* v. *Long,* 178 N. W. 936.

It is clear that the "lessees" were not either under their contract or, in fact, free from control or from the

possibility of such control in the future. The Company required that the "lessees" enter upon the said premises within fourteen days from the date of the signing of the lease, and to do not less than forty shifts of *work* each and every month during the life of the lease and to work the same in a good and miner-like fashion and in a manner necessary to good and economical mining. (Company's Exhibit 1.)

The "lessees" were required to post and keep posted, at the entry of all workings, notices to the effect that such mines were being worked by the said "lessees." (Company's Exhibit 1). The "lessees" were required to regularly report to the Company the number of shifts worked each month and the names of the individuals performing the work during such shifts.

The company retained the right to determine what individuals could be hired by Stevenson and Alverson. (Tr. 38)

> "Q. When you hired any individual to perform services on the lease, was it required that you secure the approval of the Company?
>
> "A. (Stevenson) Well, it was required in the lease, but never was done."

The "lessees" were required (Company's Exhibit 1. "Work Requirements"):

> ". . . to *personally supervise* the work and assist in the performance thereof and not to employ or bring upon the premises any persons objectionable to the Company." (Italics ours.)

On Page 13 (Plaintiffs' Brief) after referring to the Federal and State regulations and the penalties imposed for shipping "hot ore" the plaintiffs said:

> ". . . surely there can be no impropriety in requiring that lessees 'personally supervise the work and assist in performance thereof.'"

While there is no "impropriety" in such a requirement, as is embodied in the lease agreement, the circumstance that the personal supervision performed on behalf of the Company is made necessary by reason of police regulations does not mean that the services do not constitute "employment." An employee on a railroad would be nonetheless an employee by reason of the fact that the Federal and State governments, by regulation, require the railroad company to supervise the performance of his services.

On Pages 16-19 of their brief, plaintiffs argue, if the "lessees" performed "personal services" they did so on their "own account" and not for the Company. In reply to this argument, we first point out to this Court that "employment" is defined in Section 19(j) (6) (p) of the Law as follows:

> "(p) 'Wages' means all remuneration payable for personal services, including commissions and bonuses and the cash value of all remuneration payable in any medium other than cash . . ."

and not as quoted in plaintiff's brief at Page 17:

> " 'Wages' are defined in the Utah Unemployment Compensation Act as all conpensation payable for personal services rendered *for another* under a contract of hire, express or implied."

They go on to say in plaintiff's brief at Page 17:

> "Any remuneration therefore, whatever its form, may constitute wages if it is received for personal services rendered *for another.*"

We respectfully call the attention of this Court to the fact that nowhere in the Law does the definition of "services" or "wages" contain the words "for another."

The contention of the plaintiffs appears to be based on a misapprehension that if a direct advantage or benefit inures to any one other than the alleged employer, the employment relation may not exist.

We fail to find any basis for the argument either that the "lessees" were performing services solely for themselves and not for the Company or that the "lessees" are not "in employment" because the services were rendered "for their own account."

In view of the specific service requirement as set out in the lease agreement under the title of "Work Requirements:" (Company's Exhibit 1).

> "WORK REQUIREMENTS. 1. The Lessee agrees to enter upon said premises within 14 days from the date of the signing of this lease, and *to do not less than 40 shifts of work each and every month during the life of this lease*, and work the same in good and miner-like fashion and in a manner necessary to good and economical mining, and properly timber the same where necessary, so as to take out the greatest amount of ore possible with due regard to the safety, development and preservation of said premises; *to personally supervise the work and assist in the performance thereof* and not to employ or bring upon the premises any persons objectionable to the Company." (Italics ours.)

the Company certainly cannot deny that the lease agreement provided a definite performance of work and that such work constituted a service.

Actually, the "lessees" did perform services under the above-mentioned contract, and they did receive remuneration from the Company itself by virtue of the circumstances under which the Company controlled the shipments of ore and the moneys received therefrom.

The opinion of this Court in the case of *The Fuller Brush Company* v. *The Industrial Commision of Utah,* (.....Utah.....), 104 P. (2d) 201, as quoted by plaintiff's in their brief (pp.17-18) said:

> "That claimant performed personal service is not in dispute, but there is a dispute as to whether such services were performed for plaintiff or for self, and as to whether he received wages therefore or profits on sales. In other words, was the relationship between plaintiff and claimant that of employer and employee or that of vendor and vendee? The finding being positive and definite that claimant in the performance of the personal service was free of all direction and control by plaintiff, both in fact and under his contract of hire, it must follow of necessity that he did not perform service for plaintiff under a contract of hire or for wages, and therefore the relationship was one that never came within the scope of the act because he was not in employment that would bring him within the act, to wit, rendering personal services for another under a contract of hire or for wages, . . ."

it cannot be applied to this case because the two are not analogous.

In *The Fuller Brush Company* case, *supra*, the Court found:

> ". . . that claimant in the performance of personal service was free of all direction and control by plaintiff both in fact and under his contract of hire . . ."

and reasoned that since there was no control then it could not be said that the plaintiff rendered personal services for another.

We again call this Court's attention to the fact that the words *"for another"* are not contained in the definition of "wages" embodied in the Utah Unemployment Compensation Law. We wish to point out that the instant case differs from the case of *The Fuller Brush Company, supra,* in that Stevenson and Alverson were performing services under the direction and control of the Company within the provisions of the lease agreement (Company's Exhibit 1), and that, therefore, the argument advanced in the former case cannot apply in the matter now before this Court.

This Court in *The Fuller Brush Company* case, *supra,* in order to find an answer to the question of whether or not the relationship between the plaintiff and the claimant is that of vendor and vendee, used a test which was similar, if not identical, with the test as set out in Section 19(j) (5) (a) of the Law.

Because the lease agreement in the instant case, which definitely retains such right to direct and control the "lessees," is to be considered by Section 19(j) (5) (a) or a similar test, then it would necessarily follow that the application of the test laid down in the case of *The Fuller Brush Company, supra,* must lead this Court to the conclusion that the relationship between the parties was not that of lessor and lessee but that services performed by Stevenson and Alverson were services performed "in employment" within the meaning of Section 19(j) of the Law.

The plaintiffs in their brief (p.19) state that:

> ". . . the relationship between the parties was not that of employer and employee but that of lessor and lessee . . ."

and, that:

> "There is no occasion to go further; no occasion to inquire as to whether, had the lessees been employees of the lessor, they would have come within the provisions of the Utah Unemployment Compensation Law; to inquire as to the appilcability of Section 19(j) (5) since as this Honorable Court has pointed out, *(apparently refers to the case of The Fuller Brush Company)* that section becomes material only after it has been determined that personal services were rendered for another for wages or under a contract of hire." (Italics ours.)

The plaintiffs without applying any test, thought process, or reasoning whatsoever have reached the conclusion that here we have a relationship of lessor and lessee which exists for no other reason than that it arises under an agreement entitled "lease agreement."

We contend that there can be no real determination of a relationship unless that determination is based on a line of thought processes which is governed by a particular set of tests, reasons, or rules. This Court in the case of *The Fuller Brush Company* case, *supra,* based its findings on a test of control.

We submit that if the plaintiffs are relying on the rule laid down in *The Fuller Brush Company* case, *supra,* then the plaintiffs must fail in their contention that the services performed by Stevenson and Alverson were not services performed "in employment."

2. The Industrial Commission reasonably held that the Company failed to satisfy the test for exclusion as set out in Subsection (b) of Section 19(j)(5) of the Law which required a showing that:

> "(b) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and "

We submit that the services performed by the "lessees" were services performed in the usual course of the Company's business which consisted of mining and milling lead, zinc, gold, and silver ores.

The "lease agreement" contains provisions designed to secure the performance of services in conformity with the usual operations of the Company. (Tr. 24, 28, 30, 31, 35, 38, 39) (Company's Exhibit 1.)

As we have hereinbefore pointed out, there is no relationship created under the "lease agreement" which was in any way inconsistent with the employment relationship that was also created. In that agreement, the

Company reserved among other things, a right-of-way over the "lease" for not only the Company's employees and agents but, also, for any or all of its other "lessees" or their members. (Company's Exhibit 1, para. 6.)

It is immaterial that many of the controls set out in the "lease agreement" carried out a general theme that the *work* was to be performed in a "good and miner-like fashion." As a matter of fact, the provision that the work was to be performed in a "good and miner-like fashion" reserved to the Company the right to at all times control the actual performance of services so that they would conform with the usual methods of operation of the Company's business.

The "lessees" were actually performing only a part of the business of mining; the other necessary functions such as tramming of waste and ore and the marketing of the same, were performed by the Company's employees. The rights of possession granted the "lessees" under the lease agreement were clearly those rights which were immediately incident to the performance of the prospecting for and the mining of ore on the property of the Company.

The Commission reasonably found that the Company failed to make a showing that the services were not performed in the place of business of the Company and that, as a matter of fact, it is clear that the lease agreement in this case was drawn to secure the performance

of services on the Company's operated porperty and was not intended to convey any interest in the "lease block" which could in any way be inconsistent with the usual course of the business of the Company in the place of business of the Company. (Tr. 27)

We think the transcript at page 24 makes this point clear:

> "Q. When you say that the Company has no Company operations in the Queen Tunnel, you do not intend to convey the impression that the Company has no interest in the operations of that mine?
>
> "A. If I can make myself clear, our interest in the Queen Tunnel area is to have the lessees produce ore from which the Company derives by royalty payments by the lessee on the ore produced by the lessee, and it is to the Company's interest to have the lessees produce as much ore as possible because the proceeds of the lessees' operation are split on a royalty method between the Company and the lessee, and in order to facilitate the operation of the lessees the Company has provided some transportation facilities on the Queen Tunnel level in the form of a storage battery locomotive hauling, which I mentioned, and to that extent the Company does work in the Queen Tunnel area, but as far as mining ore is concerned on its own account through employees paid day's wages, the Company has no mining operations in that area."

3. The Commission reasonably concluded that the Company failed to show that the "lessees" were customarily engaged in such an independently established trade, occupation, profession, or business as was contemplated by Subsection (c) of Section 19(j) (5) of the Law.

The plaintiffs in their brief (pp. 22-23) maintain that the "lessees" were "customarily" engaged in such line of work, and that for a period of two and one-half years before the hearing of the Appeal Tribunal one of the "lessees" had been engaged in leasing. Plaintiffs further state that because Stevenson and Alverson had been engaged on this lease since June, 1938, they were therefore exempt within the meaning of Subsection (c) of Section 19(j) (5), and in connection therewith indicate that Stevenson and Alverson were operating as a so-called co-partnership.

The fact that Stevenson and Alverson engaged in work as "partners" need not be considered as a conclusive indication of a business unit or enterprise. It has a more ready explanation in the usual custom followed by so-called lessees in the mining industry. In practically all leases there is a period in which the lessee or the lessees must perform "dead work," i. e., work concerned with the development of the leased premises in which no paying ore is obtained. Normally, too, the usual lessee is unable to pay miners wages to any individual performing services on the lease with them; they therefore

arrange to secure such help by entering upon the lease as "partners."

The so-called partnership arrangement, therefore, is seen as merely a convenient way of securing the performance of services without an obligation to pay wages on the part of any one of the so-called lessees.

The language of the Law provides that the individual be independently established in, as well as customarily engaged in, and, therefore, the burden is on the plaintiffs to show that the "lessees" were customarily established in the business of producing and selling ore independently of any connection with the Company. Subsection (c) does not require that the "lessees" be engaged in another business, but it does require that the business in which they are engaged be established independently of their single connection with any one company.

There can be no such independently established business if its origin and termination depend entirely upon a particular connection. It is significant that the statute requires that the business be "independently established" and not that the business be merely independent.

The nature of the establishment governs whether the individual is subject to the type of risk which should be covered by unemployment compensation, and whether the individual performs services in a business so estab-

lished that notwithstanding the fact that a particular connection is severed, he is still in a position to continue to operate on his own accout earning a livelihood from all who choose to use his services or buy his products.

Thus to meet this "test" relating to the independent establishment of a business or trade an individual must be so set up in that business or trade that he is not dependent upon the continuance of his connection with a single company. He must have the power to perform the duties incident to his business or trade in accordance with his own methods; he must be free to buy his equipment, tools, or merchandise in the competitive market; the good will of his business must be his own, transferable at his pleasure, and for a consideration satisfactory to him; he must be able to select and determine for himself the desirability and efficiency of his own equipment and employees; the continuation of his business must in no way be dependent upon the will of another, and he must be able to determine the extent to which services will be performed for others while his performance of services for any one company is in progress.

It is clear from the record in this case that the "lessees" are not independently established. No independently established business would appear to be so subservient to a single employer for the disposal of its products and for the determination of the length of time during which it shall operate. The mere fact that the "lessees" because of their shift (Company's Exhibit 1)

were required to be on the job personally each day, negatives the possibility of the "lessees" holding themselves out as being able to undertake the operation of mines generally.

The Colorado Supreme Court in the case of *Industrial Commission of the State of Colorado* v. *Northwestern Mutual Life Insurance Company, supra,* said:

> "The third test as to exemption from coverage is that the 'individual' is customarily engaged independently in an established trade, occupation, profession or business. *This would necessitate a showing by the company to the satisfaction of the Commission that its agents are established in the business of selling insurance, independent of whatever connection they may have with the company.*" (Italics ours.)

See also *Wisconsin Bridge & Iron Co.* v. *Industrial Commission of Wisconsin, supra; Pond* v. *Michigan Unemployment Compensation Commission, et al.,* (Michigan Circuit Ct.: 1939); *Equitable Life Insurance Co. of Iowa* v. *Industrial Commission of the State of Colorado, supra.*

The foregoing presents no novel interpretation of the lease. In cases where the power and right of control vested in a lessor were less clear than in this case and under statutes providing for less extensive coverage than that provided under the Unemployment Compensation Law, "leases" were held to create the employment relationship. *Martin* v. *Republic Steel Co.,* (Ala. 1933), 146

So. 276; *Pottorff* v. *Fidelity Coal Mines Co.*, 86 Kan. 774, 122 P. 120. In the *Pottorff* case, the court said (at p. 122):

> "Without further citation from the multitude of authorities on this subject, it only remains to apply these principles to the contract in question. First as to time: The contractor may have the benefit of the agreement for five years or five days, or any shorter period at the will of the company. He must quit should 'the working of the mines not be agreeable' to the company, with no further right than to load the product mined in 60 days. But this provision so destructive of independence is not limited in its effect to time merely, for the right to thus summarily annul the agreement necessarily carries with it the potency of compelling such means and methods as will make the conduct of the work agreeable to the company. While the contract does not state that Barrett shall observe the methods and use the means prescribed by the company or suffer forfeiture, yet the company may annul the contract at its option if a failure to observe its directions in these matters should not be agreeable. The use of the word 'agreeable' seems naturally to apply to such conduct of the work as might cause danger or bring disaster to the miners or the property. But whether such a contingency was in mind or not, the sweeping reservation includes certainly the right to interpose whenever negligent methods will imperil life or porperty, and under the clause in question the company might have compelled the contractor to exercise proper care in the use of electrical applicances or to have ceased their use altogether by terminating the contract. In the Nelson case it was said that, if the Cement Company had retained

the right to discharge at will one of the contractors, they were not independent. Here the right of annulment, equivalent to a discharge, is expressly reserved in the contract.

"The contractor does not appear to be independent in other respects. The output of the mine is absolutely controlled by the company. It may operate the mines at full capacity or shut down entirely according to its own 'requirements and demands.' . . .

"It is true that the effect of a contract is not to be determined by the phraseology of detached parts, but the entire instrument as a connected whole, and each part as affected by every other part, yet in view of the provisions referred to and the spirit and purpose of the agreement as we interpret it in the light of the business to be operated under it, it is held that Barrett is not an independent contractor, and that the contract referred to is not a defense to this action."

In the Martin case, the court said at (p. 278):

"If, however, the right to supervise, direct and control the employee is, under our statute, determinative, in any way, of whether the contract creates the relation of employer and employee, the contract in this case cannot but impress the judicial mind that the reserved right of the defendant to terminate the contract, and thereby the right to discharge the employee, when, and in the event "it appears to said engineer or superintendent that said second party or any of his employees or associates has been guilty of violating

any of the rules of first party of carelessness or 'incapacity,' is of considered weight as tending to show that the employee is not an independent contractor. Bristol & G. Co. v. Industrial Commission et al., 292 Ill. 16, 126 N. E. 599; Messmer case, note 19 Ann. Cas. page 18; Bernauer v. Hartman Steel Co., 33 Ill. App. 491; Adams Express Co. v. Schofield, 111 Ky. 832, 64 S. W. 903; Shea v. Reems, 36 La. Ann. 966; Keyes v. Second Baptist Church, 99 Me. 308, 59 A. 446; Brackett v. Lubke, 4 Allen (Mass.) 138, 81 Am. Dec. 694; Morgan v. Bowman, 22 Mo. 538; Burke v. City, etc., Contract Co., 133 App. Div. 113, 117 N. Y. S. 400; Dickson v. Hollister, 123 Pa. 421, 16 A. 484, 10 Am. St. Rep. 533; Johnston v. Hostie, 30 U.C.Q.B. 232.

"It cannot be said that the right to terminate a contract, if it appears to the engineer or superintendent of the owner that the person performing the service has violated the rules of the employer, or has been 'guilty of carelessness or incapacity,' does not arm the owner (employer) with a most potent weapon to enforce the due and proper execution of the work according to the contract between the parties. This reserved right to terminate the contract in the events enumerated, to our mind, negatives the idea that the petitioner was an independent contractor. The true criterion is not whether the owner did in fact exercise supervision, but rather did he have the right to do so; did he possess the power to control? Honnold on Workmen's Compensation, Vol. 1, Page 167; State ex rel. Va. & R. Lake Co. v. District Court, 128 Minn. 43, 150 N. W. 211."

Under Sections 14 and 15 of the "lease agreement" between the Company and Stevenson and Alverson, the power to terminate is effectively established as in the above quoted case. It should not be overlooked that a primary condition for the existence of the status of an "independent contractor" unless the contract for services provides a fixed and definite result upon the completion of which such person is entitled to the contract price. See *Ludlow* v. *Industrial Commission of Utah,* 65 Utah 182; 235 P. 84. No such predetermined result existed in this case. The power of the Company to enforce its will on matters affecting the manner and means of the performance of services by the "lessees" negatives the existence of a "result."

In *Industrial Commission of Colorado* v. *Bonfils,* 78 Colo. 306, 241 P. 735, a workman's compensation case, the question before the court was whether or not a deceased coal hauler was an employee under section 9 of the Workmen's Compensation Act, which reads as follows: "The term 'employee' shall mean and include: . . . Every person in the service of any other person . . . under any contract of hire, express or implied . . ." The court said (p. 736):

> "A servant is one whose employer has the order and control of work done by him, and who directs or may direct the means as well as the end. *Arnold* v. *Lawrence,* 72 Colo. 528, 530, 213 P. 129. *By virtue of its power to discharge, the company could, at any moment, direct the minutest detail and*

> *method of the work. The fact, if a fact, that it did not do so is immaterial. It is the power of control, not the fact of control, that is the principle factor in distinguishing a servant from a contractor.* Franklin Coal & Coke Co. v. Ind. Co., 296 Ill. 329, 129 N. E. 811. The most important point 'in determining the main question (contractor or employee) is the right of either to terminate the relation without liability.' Ind. Com. v. Hammond, 77 Colo. 414, 236 P. 1006. This is a confirmation by this court of the rule above stated as to control, because the right immediately to discharge involves the right of control." (Italics ours.)

C. The lease relationship is not an exclusive one.

Apparently, the plaintiffs in their brief (pp. 9-12) argue that when a lease agreement is entered into between two parties it necessarily creates the relationship of landlord and tenant and excludes all other relationships. We submit that a true lease does not exist in this case any more than it did in *McDermott* v. *State of Washington, supra; Georgia Bureau of Unemployment Compensation* v. *Young,* 10 S. E. (2d) 412; *Wyoming Unemployment Compensation Commission* v. *Tharp; National Tunnel & Mines Co.* v. *Industrial Commission of Utah, supra; Bert Baker, Inc.* v. *Michigan Unemployment Compensation Commission,* (Mich. Cir. Court for Ingham County, July 15, 1940, C. C. H. Mich. para. 8070) for the reasons expressed in the opinions in those cases.

The facts that warrant the conclusion that a lease was entered into also justify the conclusion that coexist-

ent with the lease there was an employment relationship. In *Hughes* v. *Cheatham,* 5 M. & G. 54, 78, 44 E. C. L. 39, 134 Reprint 479 (quoted in *Kerrains* v. *People,* 60 N. Y. 221, 226 and *Ofschlager* v. *Surbeck,* 22 Misc. 595, 598, 50 N. Y. S. 862) it was said:

> "There is no inconsistency in the relation of master and servant with that of landlord and tenant."

The Utah Supreme Court has held that the employment relationship referred to in the Utah Unemployment Compensation Law is not necessarily that of master and servant at common law but takes in factual situations beyond the scope of that relationship. It is clear that a leasehold may coexist with the employment relationship with the result that a Company which considers itself a lessor will be responsible for the payment of contributions.

D. A conclusion by a State court that the employment relationship exists within the meaning of the State unemployment compensation law can have no effect upon the Company's status under the various Federal laws.

The plaintiffs argue in their brief (pp. 5-8) that a holding by this Court that the "lessees" are "in employment" within the meaning of the Utah Unemployment Compensation Law will somehow bring about an adverse application of the Federal Social Security Act and the Fair Labor Standards Act of 1938 and consequently some 1200 families in this State will be deprived of the op-

portunity of being supported by labor in a gainful occupation.

We fail to see how the coupling of the Utah Unemployment Compensation Law with the Federal Wage and Hour legislation and the Federal Social Security Act has any rational basis whatsoever. Certainly, a conclusion by a State court that the employment relationship exists within the meaning of the State unemployment compensation law can have no effect on the Company's status under the Federal Wage and Hour legislation. Particularly so since the coverage definitions of the two laws are entirely dissimilar. (See Section 19(j)(5), Utah Unemployment Compensation Law, and 29 U. S. C. A. 203(d)(e) and, in particular, (g); Act of June 25, 1938, c. 676, para. 3, 52 Stat. 1060.)

It is difficult to imagine any purpose served by the reference to the Fair Labor Standards Act of 1938 and Col. Fleming's speech at Salt Lake City on October 30, 1940. This Court should not be lead to the conclusion that the consequences of a decision adverse to the Company will be infinitely more far reaching and cause much more economic dislocation than might otherwise be expected. Contrary to the contention of the plaintiffs on page 8 of their brief, the "Acts" do not "dovetail" in "their operation and effect," and there is no legal basis for finding that "the rulings under one Act are persuasive as to the others." The very least that could be said with

respect to this rather fantastic application of the canons of statutory construction is that even within the Federal-State program for unemployment compensation the courts have refused to accord the coverage language in State unemployment compensation laws the interpretations of identical language in the Federal laws. *Richlow Manufacturing Co.* v. *Brannaman,* 104 P. (2d) 897 (1940); *Capitol Building and Loan Assn.* v. *Kansas Commissioner of Labor and Industry,* 83 P. (2d) 106 (1938); *Fidelity-Philadelphia Trust Co.* v. *Bashore,* 48 Dauph. 59, 10 Atl. (2d) 553 (1940); *Wachovia Bank and Trust Co.* v. *Unemployment Compensation Commission of North Carolina,* 12 S. E. (2d) 592 (1939).

II.

THE INDUSTRIAL COMMISSION OF UTAH ACTED WITHIN ITS JURISDICTION AS ESTABLISHED BY THE LAW.

Plaintiffs on page 23 of their brief state:

> ". . . we would say that the representative order (Record p. 3) requiring Combined Metals Reduction Company to pay into the Unemployment Compensation Fund the necessary contributions on wages earned by Stevenson and Alverson, and their employees, is without validity."

There seems to be some confusion as to what is contained in the representative's order under date of October 3, 1940: therefore, we quote from that order:

> "Based on facts and information presented to us, it is the determination of the Commission that this association of individuals does not constitute an 'employer,' but rather such individuals are performing services 'in employment' for the Combined Metals Reduction Company within the meaning of Section 19(j) of the Utah Unemployment Compensation Law (Chapter 52, Laws of Utah, 1939). You are therefore required to file with this Department, additional Forms UC-3 Rev., 'Contribution Report,' UC-106, 'Employer's Annual Report of Wages Payable,' and UC-106-A, 'Employer's Annual Report of Wages Payable to Each Worker,' on which you report the earnings of these individuals for all periods in which they perform services for you.
>
> "You are also liable to payment to the State Tax Commission of a contribution of 2.7 per cent based on the earnings of these individuals. You will be supplied with necessary forms on which to submit supplemental wage information. In the future, you will include the earnings of these individuals when filing with this Department your quarterly Form UC-3 Rev."

We fail to find in this communication any words which can be construed as requiring the payment of any moneys into the Unemployment Compensation Fund. All that is required under this order is that the Combined Metals Reduction Company file the required forms with the Department of Placement and Unemployment Insurance showing the earnings of Stevenson and Alverson for all periods in which they performed services for the Company. Certainly there can be no question as to the author-

ity of the Commission where it is delegated to so rule under Section 14(b) of the Law.

The plaintiffs appealed from this order to the Appeal Tribunal, and the Appeal Tribunal affirmed the ruling of the representative. The plaintiffs then followed the procedure as outlined in Section 10 of the Law.

In the light of these facts and the further fact that the Commission has not instituted any civil action for contributions against the plaintiffs, or any of them, it is difficult to perceive the relevance or materiality of the arguments as set out on pages 23 to 26 of plaintiffs' brief.

In enacting the Utah Unemployment Compensation Law, the Legislature entrusted the administration of the Law to the Industrial Commission (Section 11); it imposed upon the Commission the duty to administer the Law; granted it full authority to issue rules and regulations within the framework of the Law in order to accomplish its purposes and further empowered the Commission "to require such reports" and "make such investigations" as it might deem necessary to carry out the provisions of the statute. (Section 11(a).)

Section 14(b) of the Law empowers the Commission or its authorized representatives to determine the amount of contributions due from employers and to so notify the employers. We quote:

> ". . . the commission or its authorized representative, may determine the amount of wages payable for employment occurring during the period or periods with respect to which the reports were or should have been made and the amount of contribution due from such employer on the basis of such information as it may be able to obtain, and it shall give written notice of such determination to the employer . . ."

Section 19(j) (5) of the Law requires the exclusion from "employment" to be determined by the "Commission" which in turn is specifically defined by Section 19(f) of the Law to mean the "Industrial Commission;" thus, by the terms of the statute, the Commission is under a duty to determine whether services were performed "in employment."

The Law also provides definite appeal procedures and such procedures have been followed throughout in this case.

The plaintiffs, on page 26 of their brief, ask three questions of this Court which call for wholly declaratory adjudiciation bearing no relation to the issues involved in this case.

AS TO QUESTION NO. 1:

> "1. Are the District Courts of this State now without jurisdiction of a controversy between the Industrial Commission and one claiming not to be an employer?"

(1) Since the statute provides exclusively for Supreme Court review of the decisions of the Commission, there would appear to be no necessity for the Court to declare whether or not the District Courts have jurisdiction over such a controversy as it presented in this case.

AS TO QUESTION NO. 2:

"2. Is an order of the Industrial Commission requiring payment of contributions unqualifiedly invalid?"

(2) It is irrelevent and immaterial inasmuch as there is no order of the Industrial Commission in this case requiring the payment of contributions.

AS TO QUESTION NO. 3:

"3. That is to say, as we view it, does the Industrial Commission have exclusive jurisdiction even of judicial questions, in the initial stages?"

(3) This question may not be answered because it is apparent that the Commission does not make any such claim of exclusive jurisdiction in this case as is contemplated by the question.

III.

THE LAW IS CONSTITUTIONAL

Plaintiffs question the constitutionality of Chapter

43, Laws of Utah, 1937, particularly with reference to Section 19 thereof, claiming that said purported amendatory act is in conflict with Sec. 23, Art. VI of the Constitution of the State of Utah which is as follows:

> "Except general appropriation bills and bills for the codification and general revision of Laws, no bill shall be passed containing more than one subject which shall be clearly expressed in its title."

The plaintiffs have fully answered their own question by quoting the following passage from this Court's decision in the case of *Globe Grain and Milling Company* v. *Industrial Commission of Utah, supra.*

> "(6, 7) Petitioner contends that a holding as above makes the act unconstitutional as contravening fundamental law as contained in Article I, Section 7 (due process clause), Article I, Section 18 (against impairing the obligations of contract), Article VI, Section 23 (prohibiting a bill from containing more than one subject) of our State Constitution and Article 1, Section X (impairing obligations of contract) and the Fourteenth Amendment of the Federal Constitution, U. S. C. A. This formidable array of assertions of constiutionality is not supported by the citation of any authorities. If the contention that the act did not clearly express in its title the subject is good, the act is unconstitutional regardless of whether we affirm or reverse the commission's findings. *But the title does not offend in that regard.* The subject in regard to which the legislation pertains has been 'clearly expressed in the title.' The subject is 'Unemployment Compensation.' The constitutional

> provision does not require that all the methods prescribed in the act for carrying out its objects be reflected in the title, nor all the classes affected by the act. There may be compensation for some types of unemployed independent contractors, as known in the common law concept, provided for in the act, which would be covered by the subject 'Unemployment Compensation.'" 91 P. (2d) 516. (Italics ours.)

See also *Southern Photo and Blueprint Company* v. *Gore,* 114 S. W. (2d) 796, and *Gibson Products Company* v. *Murphy,* 93 Okla. Appel. 240, 100 P. (2d) 453.

Plaintiffs on pages 32 and 33 of their brief, argue that the Utah Unemployment Compensation Law incorporates an unconstitutional classification or violates the due process of law requirement by providing that:

> ". . . liability for contributions would attach as against a large class not properly includable in the term 'employer' but whose liability would be created under the new definition, based upon contractual relationships which hitherto had never been considered as constituting the relationship of employer and employee."

It can no longer be questioned that a legislature has the power to enact a statutory plan to anticipate and alleviate the evils of unemployment by providing unemployment benefits for those who have worked for others, and are presently willing to work, but cannot find work. *Chamberlin* v. *Andrews,* 271 N. Y. 1, 2 N. E. (2d) 22, aff'd 299 U. S. 515; *Gillum* v. *Johnson,* 92 Cal.

647, 62 P. (2d) 1037; *Howes Bros.* v. *Unemployment Compensation Commission,* (Mass. 1936), 5 N. E. (2d) 720 cert. denied 300 U. S. 658; *Carmichael v. Southern Coal & Coke Co.,* 301 U. S. 495; *Beeland Wholesale Co.* v. *Kaufman,* (Ala. 1937), 174 So. 516; *Steward Machine Co.* v. *Davis,* 301 U. S. 548; *Southern Photo & Blueprint Co.* v. *Gore,* supra; *Tatum et al.* v. *Mississippi Unemployment Compensation Commission,* 180 Miss. 800, 178 So. 95. The purpose and objectives of the unemployment compensation law being within the powers of the State, the classifications contained in the statute embodying the plan must, therefore, be tested by the same basic principles which underlie consideration of the plan when their validity is assailed. These tests of validity are applicable regardless of whether the contributions exacted under an unemployment compensation system are viewed as a tax on a particular class, namely on those who engage the services of others under circumstances where the continuance of the employment is dependent upon the will of the employer; or whether the classifications are regarded as being based on some relationship between those who are required to contribute and the evil sought to be remedied. Under either view, the question is simply one concerning the legislative discretion to select those subjected to an exaction. With respect to the power of a legislature to select the classes to be taxed for the purpose of creating an unemployment insurance fund, the New York Court of Appeals in *Chamberlin v. Andrews, supra,* said (p. 14):

> "Whether we consider such legislation as we have here a tax measure or an exercise of the police power seems to me to be immaterial. Power in the state must exist to meet such situations, and it can only be met by raising funds to tide over the unemployment period. Money must be obtained and it does not seem at all arbitrary to confine the tax to a business and employment out of which the difficulty principally arises.
>
> "It is said that this is taxation for the benefit of a special class, not the public at large, and thus the purpose is essentially private. The Legislature, after investigation, has found the facts to be that those who are to receive benefits under the act are the ones most likely to be out of employment in times of depression. The courts cannot investigate these facts and should not attempt to do so."

In *Beeland Wholesale Co.* v. *Kaufman, supra,* the Alabama Supreme Court sustained the contributions as a tax and justified the payment of benefits as proper expenditures to promote the safety, welfare, and health of the residents of the State. In *Carmichael* v. *Southern Coal & Coke Co., supra,* the Supreme Court of the United States sustained the contributions as a tax and the payment of benefits as expenditures designed to effect a public purpose. The Court said (pp. 508, 509):

> "As the present levy has all the indicia of a tax, and is of a type traditional in the history of Anglo-American legislation, it is within state taxing power, and it is immaterial whether it is called an excise or by another name. See Barwise v. Sheppard, 299 U. S. 33, 36. Its validity under the

> Federal Constitution principles is applicable to state taxation."

Under such circumstances it would be within the power of the State to use funds derived from any source for the purpose of maintaining an unemployment insurance plan, and the fact that the source may, in a particular statute, be identified with a particular group of taxpayers would not affect the validity of the plan. *In re Hunter's Estate,* 97 Colo. 279, 49 P. (2d) 1009; *Police Protective Ass'n* v. *Warren,* 101 Colo. 586, 76 P. (2d) 94. In *Welch* v. *Henry,* 59 Sup. Ct. 121, the Court, in sustaining a State income tax imposed on a particular group because of the necessity for relief expenditures, said (p. 125):

> "Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumed by contract. It is but a way of apportioning the cost of Government among those who in some measure are privileged to enjoy its benefits and must bear its burdens."

See also *Clark* v. *Poor,* 274 U. S. 554; *Gillum* v. *Johnson,* supra; *Nashville C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 268; *Carley & Hamilton* v. *Snook,* 281 U. S. 66; and *Knights* v. *Jackson,* 260 U. S. 12, 15;—all sustaining a tax on a group not necessarily related to the use to which the proceeds were devoted. "Expense for relief of the unemployed is on no different footing than any other governmental expense." *Scobbie* v. *Tax Commission,* 225 Wis. 529, 538, 275 N. W. 531, 535.

The fact that the group taxed may be more or less related to the situation which necessitates an expenditure, however, may justify classification. *Head Money Cases,* 112 U. S. 580 (tax on ship owners paid into fund for relief of immigrants); *State* v. *Cassidy,* (1875) 22 Minn. 312 (tax on saloon keepers to create a fund for relief of inebriates); *Cooley* v. *Board of Wardens,* 12 How. (U. S.) 299 (tax on pilotage to create a fund for relief of indigent pilots and their dependents); *Dayton Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456 (payment of a part of the excess of railroad incomes to a fund to make loans to other railroads); *McGlone* v. *Womack,* 129 Ky. 274, 111 S. W. 688, (tax on dog owners for payments for sheep killed by dogs); and *Phoenix Assurance Co. of London* v. *Fire Department of City of Montgomery,* 117 Ala. 631, 23 So. 843 (tax on insurance companies for support of City Fire Department). See also *Noble State Bank* v. *Haskell,* 219 U. S. 104.

The classifications resulting from Section 19(j)(5) may therefore be justified either as a selection of a class for a particular exaction, or a choice based on a more or less intimate relationship between the class upon which the exaction falls and the problem of unemployment. Whichever basis is followed, the rule to be applied in testing the validity of a classification is whether there is any basis therefor, and this rule is equally applicable to the classification under the unemployment compensation law. It is settled law that a legislative classification,

when subject to judicial scrutiny will not be disturbed if any conceivable state of facts would support the selections made. *Carmichael* v. *Southern Coal and Coke Co., supra; Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Milheim* v. *Moffat Tunnel Improvement Dist.,* 72 Colo. 268, 211 P. 649, aff'd 262 U. S. 710; *Consumer's League of Colorado* v. *Colorado & S. Ry. Co.,* 53 Colo. 54, 125, P. 577; *In re Hunter's Estate, supra.* The United States Supreme Court has often stated that, in the absence of any facts tending to show that a classification under a State act "in its purpose or effect is a hostile or oppressive discrimination," the legislative classification would not be disturbed. *Welch* v. *Henry, supra.* In *Carmichael* v. *Southern Coal & Coke Co., supra,* the Supreme Court said (p. 510):

> "This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

The State legislature has the authority to extend the protection of unemployment compensation to individuals who are separated from the economic relationship which has afforded them a livelihood whether it be that of master and servant or a relationship that for purposes of *ex delicto* liability may be designated as principal not independent contractor. It may also protect those whose economic relationships might be otherwise designated; provided that the classification is reasonable and related to the evil sought to be eliminated. In other words, where for some purposes a landlord and tenant relationship is believed to exist if it appears that the personal services were performed under such circumstances as to fall within the definition of "employment" there certainly exists no legal basis for arguing that the Law is inapplicable or unconstitutional.

Fundamentally the "lessees" and their employees bear the same economic relationship to the Company as any other employees whose coverage is unquestioned by the Company, and when separated from their "employment" the loss to society, the evils, and social problems that arise are no different than those arising from the unemployment of the others.

The test of coverage is not whether, for purposes irrelevant to an unemployment compensation law, the label "factor," "consignor," "independent contractor," "lessor," "landlord and tenant," etc., may be applicable to the situation, but rather whether the circumstances

under which the personal services were performed come within the statutory definition of "employment."

We submit that the "lessees" and their employees are, in fact, in no different position economically than the other employees who are admittedly "in employment" for the Company and that, therefore, this Court should find that the plaintiff "lessees" are "in employment" within the meaning of the Utah Unemployment Compensation Law.

Respectfully submitted,

GROVER A. GILES,
Attorney General

S. D. HUFFAKER,
Deputy Attorney General

A. M. FERRO,
Special Assistant
Attorney General

F. F. DREMANN,
Special Counsel